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Is there a "Legal Gap for the elimination and prohibition of nuclear weapons"?

Working paper submitted by Canada

Introduction — Canada fully supports efforts to move toward a world free of nuclear weapons, while also recognizing that how they are undertaken can have important consequences for international stability. This Open-ended Working Group (OEWG) provides an opportunity to further the important debate on how best to take forward multilateral nuclear disarmament negotiations. Some of this debate has been centred on the question of whether or not a legal gap exists. Constructive discussion is essential if we are to succeed in bridging differences in the various approaches to disarmament and achieve our mutual disarmament goals. In this spirit, Canada submits this Working Paper to set forth our position on the legal gap for the prohibition and elimination of nuclear weapons.

Two legal gap arguments: Since it was introduced at the 2014 Humanitarian Impact of Nuclear Weapons Conference in Vienna, the concept of a legal gap for the prohibition and elimination of nuclear weapons has been employed in favour of two distinct arguments. The first argues that the implementation of the Nuclear Non-proliferation Treaty (NPT) contains a number of legal gaps, because Article VI does not specify which effective measures are needed to achieve disarmament. According to this argument, all of the possible effective disarmament measures foreseen as being subject to negotiation under Article VI, constitute legal gaps because they have not yet been identified or addressed. A second argument asserts the existence of a legal gap because there is currently no universal prohibition on the use and possession of nuclear weapons, also commonly referred to as a "ban" on nuclear weapons. While such a ban could also constitute a possible disarmament measure under the NPT, this second argument bypasses the NPT by presupposing that there is a gap in international law because bans exist for other weapons of mass destruction, but not for nuclear weapons.

A closer look at the concept of a legal gap — A legal gap, or *lacuna*, is often defined as "a situation in which there appears to be no law or legal norm applicable

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in a particular instance". The mere fact that a law or legal norm has not been imposed does not necessarily mean there is a legal gap. In fact, a true legal gap requires a situation where the absence of a law or legal norm prevents an inherently "illegal" situation from being addressed, or where the applicable law is incomplete such that it prevents States Parties from fulfilling their obligations. For instance, had Article VI of the NPT required States Parties to *implement* effective disarmament measures, without specifying which ones, a legal gap would arguably exist because States Parties would lack the clarity needed to fulfil this obligation.

First legal gap argument: In fact, the first legal gap argument suggests that Article VI of the NPT contains legal gaps that can be filled by the identification of effective measures for disarmament. While effective measures do indeed need to be elaborated in order to achieve disarmament, we do not believe they can be portrayed as filling legal gaps. Article VI reads:

> *"Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control".*

The legal obligation contained in Article VI is very clear; it calls for States Parties to pursue negotiations in good faith. This was confirmed by the International Court of Justice (ICJ) in its 1996 Advisory Opinion, which concluded unanimously that there *"exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control"*. Article VI therefore contains an obligation to achieve a precise result (nuclear disarmament in all its aspects), and an obligation to achieve this result by adopting a particular conduct (the pursuit of negotiations in good faith).

The full implementation of Article VI is not obstructed by the lack of an appropriate legal norm, but rather by other factors, including the lack of trust and political will necessary to create the conditions for negotiations. The drafters of the NPT deliberately took into account the need for further debate, through negotiations, to determine the required steps to achieve disarmament. When those negotiations do occur, they will not represent the filling of a gap, but rather the fulfilment of a legal obligation that already exists within the treaty. What is being portrayed as a legal gap is simply the possible outcomes of future negotiations, and we cannot say for certain what these will be. This is not to say that work carried out in the absence of negotiations, including by this OEWG, to identify the spectrum of available legal and non-legal measures to achieve disarmament is not useful. On the contrary, Canada believes such groundwork is essential in helping us bridge important differences as we move toward these negotiations.

Second legal gap argument: Proponents of the second argument assert that it is reasonable to assume that a legal gap exists with respect to the use and possession of nuclear weapons, because such prohibitions exist for chemical and biological weapons. However, the fact that a legal norm is suitable for one situation does not mean that a legal gap exists if it is not used for another. Important and legitimate political, social, economic and pragmatic reasons can justify taking different approaches to law-making, depending on the circumstances. Furthermore, by definition, the absence of a ban on nuclear weapons' use and possession can only constitute a legal gap if such use and possession is inherently illegal, based on

applicable international law. Again, while this is an understandable aspiration, the reality is that under current customary international law, the use and possession of nuclear weapons is not illegal.

In the 1996 ICJ Advisory Opinion, the court was unable to conclude that the use of nuclear weapons would be contrary to international law in all circumstances. It determined that "there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such". Instead, the Court outlined in detail the framework of legal restrictions that has developed over the years that would apply to any use of a nuclear weapon, including the provisions of the UN Charter on the use of force, international humanitarian law, human rights law, environmental law, international treaties banning the use of poisons and gases, and international treaties concerning nuclear weapons. In other words, in the dire event that a state was to use a nuclear weapon, there would be no lack of applicable law. The situation is the same for the *possession* of nuclear weapons, which equally has not been deemed contrary to either conventional or customary international law. In fact, the current international nuclear weapons framework, including the NPT, acknowledges the possession of such weapons and sets out a regime for disarmament. In this regard, legal gap arguments have the potential to be wrongly interpreted as implying there are legal grounds, as opposed to moral or humanitarian grounds, to negotiate a ban on nuclear weapons.

Strategic implications of precipitous negotiations on a ban on nuclear weapons: Above and beyond legal arguments, the strategic merits of proceeding to an immediate ban on nuclear weapons also deserve further consideration. While proceeding with disarmament in incremental steps has already produced dividends, however modest, the effects of an instrument that would place an immediate prohibition on nuclear weapons, particularly in the absence of participation of states that possess nuclear weapons, are far from certain. It is quite possible that the premature negotiation of a ban would intensify existing rifts among states on nuclear issues, creating a less conducive environment for pursuing negotiations in good faith on nuclear disarmament. Similarly, it is possible that the imposition of a ban might have the unintended consequence of imperilling the stability achieved under the NPT.

For instance, proponents of this approach may incorrectly assume that all non-nuclear weapon states, by virtue of having already signed the NPT, would also sign a ban treaty. It is quite conceivable, however, that some NPT States Parties may actually be reluctant to do so, particularly if they are in regions where proliferation threats exist. Such a situation would generate new doubts about the actual commitment of these countries to their NPT obligations for non-proliferation or cooperation in the peaceful uses of nuclear energy. In other words, a ban, negotiated without adequate engagement of major parties, risks creating a less certain world of the sort that existed before the entry into force of the NPT, when many regions were faced with the prospect of nuclear proliferation and uncertainty impeded access to the peaceful uses of nuclear energy. Simply imposing an outright ban would not achieve the requirement of undiminished security for all.

Conclusion — The international community has determined that it is necessary to rid the world of nuclear weapons. Canada shares this aspiration, and agrees that additional disarmament measures need to be developed to meet this goal.

Our own disarmament policy in fact foresees a prohibition on nuclear weapons as part of a final comprehensive and verifiable convention that would help maintain complete disarmament. Where we disagree, however, is that progress toward nuclear disarmament can be made by efforts characterized as filling a legal gap. The NPT remains the cornerstone of the nuclear weapons' architecture and provides a sufficient legal basis for achieving a world free of nuclear weapons through negotiations in good faith.